UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)** § § CLASS ACTION
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

OPPOSITION TO MOTIONS TO DISMISS OF PHILIP RANDALL, ROMAN McALINDON, ANDERSEN-UNITED KINGDOM, ANDERSEN-BRAZIL, ANDERSEN WORLDWIDE S.C., AND ARTHUR ANDERSEN & CO., INDIA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

Page

Page

STATUTES, RULES AND REGULATIONS

Plaintiffs respectfully submit this memorandum of law in opposition to Philip Randall and Roman McAlindon ("Randall and McAlindon"), Andersen-United Kingdom and Andersen-Brazil ("Andersen UK and Brazil"), Andersen Worldwide Societe Cooperative ("AWSC"), and Arthur Andersen & Co., India's ("Andersen-India") motions to dismiss the Consolidated Complaint ("CC").

I. INTRODUCTION

These defendants attempt to escape this litigation based on a purported lack of personal jurisdiction. Mistaking their jurisdictional motion for a summary judgment motion or trial brief, defendants posture themselves as innocent pawns tending to mere accounting or managerial duties in the United Kingdom, Brazil, Switzerland, and India. The reality is quite different. As set forth more thoroughly herein, AWSC, Andersen UK and Brazil, Randall and McAlindon, and Andersen-India were all involved in the fraudulent scheme pled in the CC. Furthermore, Randall and McAlindon, were control persons of Andersen.

Plaintiffs have established *prima facie* evidence supporting personal jurisdiction over each defendant. First, defendants' conduct of participating in the Enron fraudulent scheme satisfies the governing standards of "minimum contacts" with the United States. Second, as "controlling persons," this Court has personal jurisdiction over defendants Randall and McAlindon. Thus, under well-established principles, jurisdiction over these defendants is perfectly proper. Further, defendants' arguments regarding service are similarly without merit.

AWSC also claims that plaintiffs have failed to state a claim against it. But AWSC was a member, along with Arthur Andersen, of the Andersen Worldwide Organization ("AWO") As partners, AWSC bears responsibility for the accounting fraud committed by Arthur Andersen. AWSC, moreover, faces liability for the fraud committed by its own partners, including Thomas Bauer and David Duncan, individuals deeply involved in the Enron fraud.

II. ARGUMENT

A. Defendants Either Have Been or Are Being Properly Served

These defendants contend that the Summons and CC have not been served on them or any of their representatives. *See* Andersen-India Motion ("India-MTD") at 3; Declaration of Bobby Parikh in Support of Andersen-India's Motion to Dismiss the Complaint ("Parikh Decl."), ¶13; UK

and Brazil Motion ("UK-MTD") at 2-3; Affidavit of John Ormerod ("UK Aff."), ¶13; Affidavit of Francisco Papellas Filho ("Brazil Aff."), ¶12; Randall and McAlindon Motion ("Randall MTD") at 3; Affidavit of Mr Philip Randall ("Randall Aff."), ¶11; and Affidavit of Mr. Roman McAlindon ("McAlindon Aff."), ¶11. These defendants further argue that because of this alleged defect in service, the action should be dismissed as to all of them pursuant to Fed. R. Civ. P. 12(b)(5). India MTD at 4; UK-MTD at 3-4; Randall MTD at 3.

Contrary to their arguments, defendants Andersen-India, Andersen UK and Brazil have in fact already been served. In addition, plaintiffs are in the process of serving defendants Randall and McAlindon through the Hague Convention. So far, Randall's and McAlindon's counsel have refused to accept service for them. *See* Declaration of Helen Hodges ("Hodges Decl."), ¶2.

1. Defendants Andersen UK and Brazil and Andersen-India Have Been Properly Served With the CC

Defendants Andersen UK and Brazil and Andersen-India contend that they have not been properly served with the CC. UK-MTD at 2-3; UK Aff., ¶13; Brazil Aff., ¶12; India MTD at 3; Parikh Decl., ¶13 Defendants Andersen UK and Brazil also assert that they must be served in accordance with international law UK-MTD at 4. Furthermore, defendant Andersen-India alleges that the service which was accepted on its behalf by Carol Gadbois in Chicago, Illinois was not effective because "no one in the United States is authorized to accept process on its behalf." India MTD at 4 n.2; Parikh Decl., ¶¶4-5, 7. Despite the arguments of defendants Andersen UK and Brazil, and Andersen-India to the contrary, these defendants have in fact been properly served with the CC.

Defendants Andersen UK and Brazil and Andersen-India were all served in Chicago, Illinois on April 10, 2002 by Corey Fertel. *See* Hodges Decl., Exs. B and C. Carol Gadbois accepted service for Andersen UK and Brazil and Andersen-India. *See id.* Therefore, because Ms. Gadbois accepted service for defendants Andersen UK and Brazil and Andersen-India, these defendants have in fact been properly served and are a part of this action [1]

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[1] If this Court finds that service on defendants Andersen UK and Brazil, or Andersen-India was not proper, plaintiffs will go through any steps this Court requests or will serve according to the international laws recognized by the United Kingdom, Brazil, and India in order to effect service. As is described *infra*, the Court does have personal jurisdiction over these defendants. Accordingly, this action should not be dismissed as to these defendants if the Court finds that these defendants

2. Defendants Randall and McAlindon Are Being Properly Served with the CC

Defendants Randall and McAlindon also contend that they have not been properly served with the CC. Randall MTD at 3; Randall Aff., ¶11; McAlindon Aff., ¶11. Plaintiffs, however, are presently in the process of serving defendants Randall and McAlindon in accordance with the Hague Convention. *See* Hodges Decl., ¶3.[2] Furthermore, defendants Randall and McAlindon have been sent a copy of the CC as a courtesy. *See* Hodges Decl., ¶5.

Therefore, because plaintiffs are in the process of serving defendants Randall and McAlindon, and this Court has personal jurisdiction over these defendants, as further discussed below, this action should not be dismissed as to these defendants.

Accordingly, defendants Andersen-India's, Andersen UK and Brazil's, and Randall and McAlindon's motions based on a purported failure to properly serve them, should be denied.

B. The Court Has Jurisdiction Over These Defendants

1. The Governing Personal Jurisdiction Standards

Plaintiffs' securities laws claims arise under the 1933 Act and the 1934 Act. Section 27 of the 1933 Act governs personal jurisdiction [3] The statute provides that any action brought under the 1934 Act:

> may be brought ... in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U S.C. §78aa.

Accordingly, personal jurisdiction turns on the operation of the statute's "nationwide" service of process provision, which "gives the district court the authority to serve defendants nationwide."

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have not yet been properly served.

[2] As plaintiffs understand, service under the Hague Convention could take months to be effected. *See* Hodges Decl., ¶4.

[3] Section 22 of the 1933 Act governs jurisdiction under the 1933 Act. 15 U.S.C. §77v. "The jurisdictional reach of Section 22 is viewed as being coextensive with that of Section 27 of the Exchange Act.... Thus ... case law analyzing Section 27 of the Exchange Act governs the jurisdictional inquiry." *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 305 n.17 (E.D.N.Y. 2002).

Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F. 3d 1255, 1257 (5th Cir. 1994). *See also Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985); *Mariash v. Morrill*, 496 F.2d 1138, 1142 (2d Cir. 1974); *see, e.g., GRM v. Equine Inv. & Mgmt. Group*, 596 F. Supp. 307, 311 (S.D. Tex. 1984).

Thus, plaintiffs need only show that defendants are subject to personal jurisdiction in the United States, rather than specifically in Texas. Defendants assert that jurisdiction requires minimum contacts with Texas. (*See* Randall MTD at 6; UK-MTD at 6). In support of this argument, defendants rely on the Fifth Circuit's criticism of *Busch* in *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 826 (5th Cir. 1996). Defendants' argument is fatally flawed. Despite *Bellaire's* criticisms, "the Bellaire court applied the Busch standard, which remains binding precedent in the Fifth Circuit." *SEC v. Cook*, No. 3:01-CV-481-R, 2001 U.S. Dist. LEXIS 11326, at *5 (N.D. Tex. Aug. 2, 2001).

In opposing a motion to dismiss for lack of personal jurisdiction, plaintiffs' burden is only to present a *prima facie* case for jurisdiction. *Amoco Chemical Co. v. Tex Tin Corp.*, 925 F. Supp. 1192, 1199 (S.D. Tex. 1996). *See also Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 384-85 (5th Cir 1989); *De Melo v. Toche Marine, Inc.*, 711 F.2d 1260, 2370-71 (5th Cir. 1983); *Black v. Acme Markets, Inc.*, 564 F.2d 681, 683 n.3 (5th Cir. 1977). Thus, "[t]he plaintiffs need not establish all facts necessary to support a cause of action for the Court to exercise personal jurisdiction." *Amoco*, 925 F. Supp. at 1199. A court "must take as true the allegations in plaintiffs' Complaint, except as controverted by [a] defendant['s] affidavit." *GRM*, 596 F. Supp. at 312 n.8. "Conflicts in the facts alleged by the parties must be resolved in the plaintiff's favor" and thus in favor of exercising jurisdiction. *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 917 (5th Cir 1987); *Amoco*, 925 F. Supp. at 1199. *See also Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992).[4]

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[4] "Eventually personal jurisdiction must be established by a preponderance of the evidence, either at an evidentiary hearing or at trial." *A.I. Trade Fin. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir 1993). To the extent the Court finds personal jurisdiction lacking at this time as to any defendant, plaintiffs are entitled to discovery on the jurisdictional issue. *See Villar v. Crawley Maritime Corp.*, 990 F.2d 1489, 1501-02 (5th Cir. 1993) ("when a diligent plaintiff present[s] a non-frivolous claim of jurisdiction and request[s] jurisdictional discovery, the district court [is] required

In other words, defendants' motions to dismiss on personal jurisdiction grounds are handled like any other Rule 12(b) motion: the pleading is deemed true, conflicts are resolved in the plaintiffs' favor, and resolution of factual disputes occurs later in the litigation. As set forth below, personal jurisdiction clearly exists as to all defendants.

2. Defendants Have Sufficient "Minimum Contacts" with the United States

a. Defendants' Conduct Satisfies the National Contacts Standard

When a court evaluates the personal jurisdiction over a defendant based upon a federal statute providing for nationwide service of process (like §27 of the 1934 Act), "the relevant inquiry is whether the defendant has had minimum contacts with the United States." *Busch*, 11 F.3d at 1258. The required contacts with the United States can be established under the doctrine of "specific jurisdiction." If the defendant has "'purposefully directed'" its activities to the United States, and the lawsuit is based on activities that either relate to or arise out of those activities, jurisdiction is proper *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).[5]

Specific jurisdiction exists over defendants for three reasons: (1) their involvement in the Enron fraudulent scheme establishes "minimum contacts"; (2) AWSC's partners' fraudulent conduct in the United States establishes minimum contacts; and (3) their conduct was designed to harm plaintiffs in the United States.

b. Defendants' Involvement in the Fraudulent Scheme Establishes Minimum Contacts

The Northern District of Texas has held that a foreign defendant's alleged involvement in a U.S.-based fraudulent scheme will suffice to create minimum contacts with the United States. *Cook*,

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to allow that discovery"). *See also Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 478 (S.D. Tex. 1995).

[5] The second method is "general jurisdiction," in which the defendant's contacts, unrelated to the lawsuit, are "continuous and systematic," rendering jurisdiction "'reasonable and just.'" *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 (1984). *See also Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415,419 (5th Cir. 1993) (summarizing requirements for specific and general jurisdiction under minimum contacts inquiry). While plaintiffs do not waive the argument that general jurisdiction exists over defendants in this case, such a determination is premature where no discovery has taken place and the extent of defendants' contacts with the United States outside the context of the Enron fraudulent scheme are unknown.

2001 U.S. Dist. LEXIS 11326, at *7. In *Cook*, defendant, Maroni, LTD., argued that the court did not have personal jurisdiction over it because it was a corporation of the nation of Dominica, owned no assets in Texas and had no dealings or contacts with Texas. *Id.* at *3. The SEC alleged that Maroni was involved in a fraudulent scheme directed at the United States. *Id.* at *6-*7. Maroni's involvement consisted of allegedly soliciting new investors, handling the dissemination of information to these potential investors, and assisting investors in placing their funds into the scheme. *Id.* Additionally, Maroni allegedly received several wire transfers from a co-defendant in U.S. currency, which consisted of funds from U.S. investors. *Id.* The court specifically held that "[t]hese activities suffice to create minimum contacts with the United States and therefore, this Court may assert personal jurisdiction over Moroni. Again, notions of fair play and substantial justice are not offended by the Court's exercise of jurisdiction over Moroni." *Id.* at *7. Here, the Court may assert jurisdiction over defendants Andersen UK and Brazil and Andersen-India based on their involvement in the Enron scheme.

Defendants Andersen UK and Brazil contend that the Court does not have personal jurisdiction over either of them "because these firms had only limited contacts with the United States and Texas." *See* UK-MTD at 2. They further assert that this Court lacks jurisdiction over them because neither "is registered to do business in either the United States or Texas," and neither "of these entities provides services to clients based in Texas or the United States." UK-MTD at 9. In addition, defendants Andersen UK and Brazil argue that they "simply are not directly implicated in any of the alleged improprieties in this case." UK-MTD at 11.

Despite their contrary contentions, the Court has personal jurisdiction over defendants Andersen UK and Brazil. Defendants Andersen UK and Brazil were participants in the Enron scheme. As alleged in the CC:

> Andersen-United Kingdom participated in the 97-00 audits of Enron. Andersen-United Kingdom has been implicated in the document shredding indictment, indicating an awareness of possible wrongdoing in connection with work for Enron.

CC ¶92(f).

In addition, "Andersen-United Kingdom provided services to Enron relating to commodities trading and the Wessex water plant." CC ¶897. Furthermore, ***by its own admission*** Andersen-United Kingdom was

> engaged by certain UK subsidiaries of Enron Corp. to perform certain audit services required by UK law. In addition, Andersen LLP engaged Andersen-UK to report on Enron's European operations in connection with Andersen LLP's audits of the consolidated financial statements of Enron Corp

UK Aff., ¶12.

Andersen-Brazil also participated in the 97-00 audits of Enron and rendered professional services for the Cuiaba, Brazil Power Plant. CC ¶¶92(e), 897. Moreover, ***by its own admission***, Andersen-Brazil was "engaged by certain Brazilian subsidiaries of Enron Corp. to conduct audits of and provide certain tax services to three subsidiaries or joint ventures of Enron." Brazil Aff., ¶11. Accordingly, this Court may assert personal jurisdiction over Andersen UK and Brazil based on their involvement in the Enron scheme.

This Court may also assert personal jurisdiction over defendant AWSC based on its involvement in the Enron scheme. AWSC asserts that "this Court as a matter of comity should decline to exercise jurisdiction over AWSC." AWSC MTD at 2. AWSC's argument is based on the assertion that Swiss law would not recognize the Court's assertion of jurisdiction over it, and therefore, this Court may not assert jurisdiction over it. AWSC MTD at 6. AWSC is wrong.

As alleged in the CC, AWSC participated in the 97-00 audits of Enron and dictates the policies and procedures to be used within Andersen throughout the world. CC ¶92(a). Furthermore, AWSC is a partner in the AWO, which operates as a single global partnership. CC ¶971. As a partner of AWO, which markets itself as "a single worldwide operating structure" that "think[s] and act[s] as one," AWSC cannot credibly assert that the Court lacks jurisdiction over it. *Id.*

The Court may also assert personal jurisdiction as to defendant Andersen-India for its involvement in the Enron scheme. Andersen-India asserts that "there exists no basis upon which to find that Andersen-India is subject to the specific jurisdiction of this Court." *See* India-MTD at 9. Defendant Andersen-India seems to base its argument on the contention that it has not "had anything to do with Texas or the United States." India-MTD at 8; Parikh Decl , ¶¶1-11.

Defendant Andersen-India was a participant in the Enron scheme. As alleged in the CC, "Andersen-India participated in the 97-00 audits of Enron." CC ¶92(b). In addition, "Andersen-India provided services related to the power plant in Dabhol." CC ¶897. Moreover, ***by its own admission***, Andersen-India "has provided tax services, and performed statutory audits and limited agreed upon procedures in respect of certain Enron subsidiaries and associated entities in India." Parikh Decl , ¶12 As such, defendant Andersen-India cannot reasonably argue that the Court lacks jurisdiction over it.

Finally, the Court may exercise personal jurisdiction over defendants Randall and McAlindon based on their involvement in the Enron scheme. Randall and McAlindon contend they had limited contacts with the United States, "almost non-existent contacts with Texas," and that they did not do any work for Enron or Enron-related entities. *See* Randall MTD at 2 In addition, defendants Randall and McAlindon emphasize that "the Complaint actually alleges more about what Defendants Randall and McAlindon did not do than about what they have done." Randall MTD at 7-8 (emphasis omitted).

Defendants Randall and McAlindon's assertion that the Court lacks personal jurisdiction over them is wrong. Defendants Randall and McAlindon were control persons of Andersen pursuant to §20(a) of the 1934 Act and §15 of the 1933 Act. CC ¶96. As such, the CC alleges that defendants Randall and McAlindon were involved in the Enron fraudulent scheme. Accordingly, the Court may assert jurisdiction over these defendants

Here, as previously discussed, the CC specifically alleges defendants Randall and McAlindon, Andersen UK and Brazil, AWSC, and Andersen-India were all involved in the Enron scheme. Defendants assert that because they were not in the United States during their involvement with the Enron fraudulent scheme, they do not have sufficient minimum contacts with the United States such that this Court may assert jurisdiction over them. But, under *Cook*, defendants are wrong. Defendants Randall and McAlindon, Andersen UK and Brazil, AWSC, and Andersen-India's involvement with the U.S.-based Enron fraudulent scheme is sufficient to establish minimum contacts with the United States. *Cook*, 2001 U.S. Dist. LEXIS 11326, *7.

c. AWSC's Partners' Actions Within the United States Establishes Minimum Contacts

The Court may also assert jurisdiction over defendant AWSC based on the actions of its partners within the United States. The Fifth Circuit has held that "'[a] partner's actions may be imputed to the partnership for the purpose of establishing minimum contacts.'" *Lewis v. Fresne*, 252 F.3d 352, 359 (5th Cir. 2001) (quoting *Sher v. Johnson*, 911 F.2d 1357, 1366 (9th Cir. 1990)). In *Lewis*, the court found that minimum contacts existed between the defendant partnership and the forum based solely on the partner's actions within the forum. *Id.*

Similarly, here, minimum contacts exist between AWSC and the forum, the United States, based on the actions of the AWSC partners. As alleged in the CC, AWSC partners Joseph F. Berardino, Thomas H. Bauer, Donald Dreyfus, David B. Duncan, James A. Friedlieb, David Stephen Goddard, Jr., Michael M. Lowther, Michael C. Odom, John E. Stewart, and William E. Swanson all played an integral part of the Enron audit and consulting engagements and all resided in the United States. CC ¶¶93(a), (b), (c), (e), (f), (g), (i), (k), (m), (o). Thus, the Court may assert personal jurisdiction over AWSC because the AWSC partners' conduct of participating in the Enron scheme within the United States "'may be imputed to the partnership for the purpose of establishing minimum contacts.'" *Lewis*, 252 F.3d at 359.

d. Defendants' Conduct Was Designed to Harm U.S. Investors

Jurisdiction exists because defendants engaged in a course of conduct that was designed to harm American investors. If a defendant's intentional acts were designed to cause harm in the forum, it is subject to specific jurisdiction in that forum. In *Amoco Chemical*, 925 F. Supp. 1192, the court exercised jurisdiction over a foreign company that was an alleged party to a fraudulent transaction that occurred outside of Texas, but which injured the plaintiff Texas company. The court concluded that the defendant established sufficient contacts by intentionally harming the plaintiff, though the defendant had no contact with the forum.

> Although the mere foreseeability of injury . . is not enough to establish personal jurisdiction in that state ... intentional conduct designed to cause harm in the forum state is, indeed, a basis for finding minimum contacts, *Calder v. Jones*, 465 U.S. 783, 787-90 ....

Id. at 1200 (holding that defendant's acts outside the forum state, which caused injury in the forum state, subjected them to personal jurisdiction).

The harm caused to U.S. investors by defendants' conduct is even more severe than the alleged fraudulent transaction in *Amoco*. As explained above, defendants Randall and McAlindon, Andersen UK and Brazil, AWSC, and Andersen-India were all intricately involved in the Enron fraudulent scheme. By their participation in the Enron scheme, these defendants were able to earn substantial amounts of money through accounting and consulting fees. The involvement of these defendants caused losses to U.S. investors that measure in the billions of dollars.

Thus, personal jurisdiction exists because defendants Randall and McAlindon, Andersen UK and Brazil, AWSC, and Andersen-India's conduct in participating in the Enron fraudulent scheme was designed to harm U.S. investors.

e. The Exercise of Personal Jurisdiction over Defendants Also Satisfies Due Process

Finally, the exercise of jurisdiction must comport with constitutional due process. For "'traditional [conceptions] of fair play and substantial justice'" to preclude exercising jurisdiction over defendants, they must present "a compelling case" that such exercise would actually be unreasonable in the circumstances of this case. *Burger King*, 471 U.S. at 464, 477. In making this determination, courts consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, public policy concerns, and judicial efficiency. *Asahi Metal Industry Co v. Superior Court of California*, 480 U.S. 102, 113 (1987). Defendants' assertions in this regard fall well short of being "a compelling case" sufficient to escape this Court's exercise of jurisdiction over them.

The interest of this Court in exercising jurisdiction over the massive fraud perpetrated on U.S. investors outweighs any inconvenience to defendants. A review of several of the *Asahi* factors suffices to show that the exercise of jurisdiction over defendants comports with due process.

First, this Court has personal jurisdiction over defendants over whom a Brazilian, English, Swiss or Indian court would not likely have personal jurisdiction, let alone subject matter jurisdiction over the claims asserted.

Second, the sheer magnitude of the fraud perpetrated on U S. investors militates in favor of finding personal jurisdiction. The Enron fraudulent scheme led to Enron's filing for bankruptcy – the largest bankruptcy in history CC ¶66. The losses to investors are measured in the billions of dollars. Clearly, the United States has an acute interest in enforcing its securities laws in this case.

Third, defendants, by engaging in the Enron fraudulent scheme which defrauded U.S investors, purposefully directed their actions toward the United States. They knew or should have known that their actions would adversely affect U.S. investors. Defendants earned significant income through accounting and consulting fees as a result of their participation in the Enron fraudulent scheme. They should not be heard to complain when haled into court here.

3. The Court Has Personal Jurisdiction over Defendants Randall and McAlindon as "Controlling Persons"

Randall and McAlindon's status as "control persons" of Andersen pursuant to §20(a) of the 1934 Act and §15 of the 1933 Act provides a basis for personal jurisdiction. 15 U.S.C. §78t(a).

Although worded differently, the control person liability provisions of §15 of the 1933 Act and §20(a) of the 1934 Act are interpreted the same way. *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 869 n.17 (S.D. Tex. 2001). In order to properly allege controlling person liability under §15 of the 1933 Act, the plaintiff must simply allege an underlying primary violation of §11 by the controlled person, control by the defendant over the controlled person, and facts as to the controlling person's culpable participation in the exercising of control over the fraud perpetrated by the controlled person. *See In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, No. H-99-1948, slip op. at 11 n.13 (S.D. Tex. Feb. 20, 2001)[6] (citing *Ellison v. American Image Motor Co.*, 36 F. Supp 2d 628, 637-38 (S.D.N.Y. 1999)). Moreover, "The Fifth Circuit has stated that a plaintiff need only show that the alleged control persons possessed 'the power to control [the primary violator], not the exercise of the power to control.'" *BMC Software*, 183 F. Supp. 2d at 869 n.17 (quoting *Abbott v. Equity Group*, 2 F.3d 613, 620 (5th Cir. 1993)).

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[6] Due to the length of this opinion, and the fact that this Court has access to it, it is not being attached to this brief.

Numerous courts have exercised personal jurisdiction over foreign defendants as controlling persons. For example, in *McNamara v. Bre-X Minerals, Ltd.*, 46 F. Supp. 2d 628, 636 (E.D. Tex. 1999), the court held that if the defendant, a foreign corporation, fit the definition of a control person, it was subject to the jurisdiction of U.S. courts, regardless of whether the minimum contacts standard was satisfied. *See also San Mateo County Transit Dist. v. Dearman, Fitzgerald & Roberts, Inc.*, 979 F.2d 1356,1358 (9th Cir. 1992) (standard for personal jurisdiction is met if plaintiff makes nonfrivolous allegation that defendant is controlling person); *Landry v. Price Waterhouse Chartered Accountants*, 715 F. Supp. 98, 102 (S.D.N.Y. 1989) (foreign attorney subject to the jurisdiction of a United States court as a "control person" due to his knowledge of the listing of the corporation's stock on NASDAQ); *Derensis v. Coopers & Lybrand Chtd. Accountants*, 930 F Supp. 1003, 1014 (D.N.J. 1996) (foreign corporate director and a foreign corporate officer who approved and disseminated financial statements they knew would influence the price of the corporation's securities on NASDAQ were both "controlling persons" and subject to the personal jurisdiction of the U S. court).

In *McNamara*, one of the defendants, a Canadian corporation, argued that it was not subject to the court's jurisdiction because it neither did business nor had a presence in the United States *McNamara*, 46 F. Supp. 2d at 633 The court disagreed, finding that plaintiffs had made a *prima facie* showing that defendant was a controlling entity through allegations in the complaint. *Id.* at 636. The *McNamara* court specifically held that it "has personal jurisdiction over any Defendant as to which the Plaintiffs make a *prima facie* showing of control person liability." *Id.*

Thus, contrary to defendants Randall and McAlindon's assertion, the Court has personal jurisdiction over them. The allegations in the CC, taken as true, establish a *prima facie* case of control person liability as to Randall and McAlindon for jurisdictional purposes.

As alleged in the CC, defendants Randall and McAlindon were control persons of Andersen pursuant to §20(a) of the 1934 Act and §15 of the 1933 Act. CC ¶96. Specifically, Randall was "Andersen's Country Managing Partner for Arthur Andersen-United Kingdom throughout the Class Period until 1/10/01, when he became Managing Partner-Global Operations." CC ¶93(u). And McAlindon was "Andersen's Regional Managing Partner for the Nordic Countries, Southern and

Western Africa, Ireland, India and Israel until 3/15/01, when he was appointed to the CEEMEIA Region-("Central and Eastern Europe, Middle East, India and Africa") on 3/01." CC ¶93(v).

These allegations – which must be taken as true at this stage of the pleadings – demonstrate that defendants Randall and McAlindon, possessed the "power to directly or indirectly control or influence corporate policy." *G.A. Thompson & Co. v. Partridge*, 636 F 2d 945, 958 (5th Cir. 1981). Accordingly, the Court has jurisdiction over Randall and McAlindon as control persons of Andersen

C. AWSC's Substantive Arguments Lack Merit

1. Andersen Operates as a Single Firm

Plaintiffs allege that Arthur Andersen LLP, AWSC, and other member firms of the AWO operate as a single global entity to promote a common interest of providing accounting and consulting services to their clients across the globe. CC ¶971. The member firms of AWO apportion profits and losses from their worldwide venture and share in the governance and control of it. CC ¶¶973(a), (d), 975-976. These are classic characteristics of a partnership. *See Ballard v. United States*, 17 F.3d 116, 118 (5th Cir. 1994).

a. The AWO Partners' Common Interest

AWO, established in 1977 to manage the worldwide expansion of Arthur Andersen LLP, is a global partnership that provides assurance, tax, consulting, and corporate finance services through 390 offices and "more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing and a focus on client success." CC ¶¶973(a), 974. The AWO partnership comprises AWSC, AWSC's partners, and individual AWO member firms. CC ¶971. Arthur Andersen LLP and other member firms form an integrated network of services providers to meet the business demands of AWO's multinational clients. AWSC is the administrative partner of AWO and serves as the instrumentality through which member firms coordinate their common efforts on a worldwide basis. CC ¶¶971, 973, 975-77. Together, the partners allow AWO to function as "a single worldwide operating structure"; an organization that "think[s] and act[s] as one." CC ¶971.

AWO and its member firms hold themselves out as a single global network

- Andersen refers to the brand identity adopted by member firms of the Andersen "***global client service network***."

- "With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries ***who are united by a single worldwide operating structure*** that fosters inventiveness, knowledge sharing and a focus on client success."

- Andersen spokesman Dave Tabolt – "***We conduct more than 30,000 audits around the world every year*** ...."

- "***AA is already much more integrated globally than the rest of the Big Five***. As Mr. Berardino points out, '***there is one name over the door***. We're not an alphabet soup.'"

AWO's Web site confirms it is one worldwide organization:

- "***Our 390 offices may be scattered amid 84 different countries, but our voice is the same. No matter where you go, or who you talk to, we act with one vision. Without boundaries***."

- "***One world. One organization***."

As does Arthur Andersen's recruiting brochures:

- "We will, in Arthur Andersen's own words, ***'act as one firm and speak with one voice***. It is a united family that ***operates across hierarchies, geographical boundaries***, client groupings, service lines and competencies and feels the kinship of understanding and shared responsibility."

CC ¶974.

Employees exchange correspondence and e-mail labeled "Andersenwo" – short for "world organization." CC ¶981. Arthur Andersen documents bear AWO's logos and insignia. *Id.* And Arthur Andersen refers to itself and AWO interchangeably as "Andersen." *Id.* Moreover, Arthur Andersen and AWSC even share the same office space for their headquarters – 33 West Monroe Street, Chicago, Illinois. CC ¶980. These allegations are more than sufficient to show a community of interest in the AWO global partnership. *See Ballard*, 17 F.3d at 118-19.

Testimony from Michael Jones in the Andersen criminal trial confirms that AWO and its member offices operated as a single entity in providing accounting and consulting services to Enron:

> A. The audit engagement teams on ENRON were broken up by business unit and business segment. The wholesale business unit primarily encompassed the trading activities, but it also encompassed the international assets as well.
>
> Europe was a component of wholesale. So Europe dealt with trading as well as physical assets within United Kingdom and primarily Western Europe. They – the engagement team there audited that business unit for the purpose of reporting into the larger wholesale unit, which the partner was Tom Bauer. And the wholesale unit,

then, reported up to the consolidated corporate business unit, which was headed by Dave Duncan. And there were different partners that were in charge of different business units.

* * *

A. I was one of four engagement partners, and I was there [in London], again, with the narrow focus of providing advice to the application of U.S. GAAP to the transactions that were executed in the United Kingdom, for the overall purpose of reporting to Tom Bauer in Houston on the U.S. GAAP results of ENRON Europe.

United States v. Arthur Andersen, LLP, No. H-02-121, 5/28/02 Trial Transcript at 5307: 6-18, 5308: 7-2.

b. Sharing of Profits and Losses by AWO Partners

Financially, AWO operates as a single global enterprise. CC ¶982. AWO partners share profits and losses from their venture, including the fees generated from the Enron engagement. CC ¶973(b) Profits from Arthur Andersen, for instance, have been flowing to member firms in Europe, Asia, and Australia for years. *Id.* "While some rivals are still struggling with a complicated array of national partnerships, and thus different systems for sharing pay," declared AWSC CEO Berardino, "AA partners enjoy a single, and possibly unique, system of remuneration: they receive a list of what each of them has earned in the past year." CC ¶974. Ordinarily a "presumption of partnership" is created when parties agree to share profits and losses of a business. *See Reyes-Retana v. PTX Food Corp.*, 709 S W.2d 695, 697 (Tex. App. – San Antonio 1986, writ ref'd n.r.e.). Indeed, the Texas Uniform Partnership Act in effect at the time the AWO global partnership was created provides that the "receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business." Tex. Rev. Civ. Stat. Ann. art. 6132b, §7 (Vernon 1993).

c. Mutual Right of Control

AWO partners manage, direct and control the member firms through practice partners and the creation of practices groups. CC ¶975. Regional practice directors control the practice groups and report to global practice directors. CC ¶976. In addition, AWSC appoints a managing partner to supervise each region. CC ¶977. Defendant Joseph Berardino served as Chief Executive Officer and Managing Partner of AWSC. CC ¶979. AWSC partners involved in the Enron fraud include

Berardino, Thomas Bauer, Donald Dreyfus, David Duncan, James Friedlieb, Stephen Goddard, Michael Lowther, Michael Odom, John Stewart, and William Swanson. CC ¶¶93, 978.

AWSC promulgates professional standards that govern the AWO member firms, and its Assurance Professional Standards Group provides guidance for complying with these standards. CC ¶973(c). Partner firms that violate professional standards may be expelled from AWO. *Id.* AWSC's partnership duties also include furnishing the legal, financial, and administrative infrastructure necessary for the AWO member firms to function as a cohesive global entity. CC ¶973(d). AWSC's "degree of management or control" over other AWO member firms evidences the existence of a partnership. *See Ballard*, 17 F.3d at 119.

"[I]t is well established that under the law of partnerships, knowledge and actions of one partner are imputed to all others." *Engl v. Berg*, 511 F. Supp. 1146, 1154 (E.D. Pa. 1981) (§10(b) case); *see Gorsey v. I.M. Simon & Co.*, No. 86-1875-Z, 1990 U.S. Dist. LEXIS 7005, at *19 (D. Mass. Mar. 6, 1990); *Northwestern Nat'l Bank v. Fox & Co.*, 102 F.R.D. 507, 511 (S.D.N.Y. 1984). This rule applies to both limited and general partners *Engl*, 511 F. Supp. at 1154. And nothing in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), undermines these "hoary principles" of agency law. *See Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001); *Cromer Fin., Ltd. v. Berger*, No. 00 Civ. 2284 (DLC), 2002 U.S. Dist. LEXIS 7782, at *21 (S.D.N.Y. May 2, 2002) (*Cromer II*). AWSC is thus liable for the fraudulent Enron audit opinions Arthur Andersen issued, conduct within the course and scope of the AWO global partnership.

AWSC attempts to persuade the Court that AWO is not a partnership. But whether a partnership exists "'is usually a question of fact, to be resolved by the jury.'" *Misco-United Supply, Inc. v. Petroleum Corp.*, 462 F.2d 75, 79-80 (5th Cir. 1972). As a California district court declared, "whether affiliated accounting firms are a single global partnership is a question of fact." *In re Bank of Credit & Com. Int'l Depositors Litig. v. Price*, No. MDL-908, 1992 U.S. Dist. LEXIS 22768, at *52 (C.D. Cal. Apr. 29, 1992).

AWSC also runs from the admissions of its partners that AWO is a single global entity. Relying on *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 662-63 (S.D.N.Y. 1997)

and *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241 (S.D.N.Y. 1984), AWSC suggests that their admissions are irrelevant because some appear in promotional literature. *Howard* merely held that "general public statements" suggesting an international network of firms alone are insufficient to justify the finding of partnership. 977 F. Supp at 662. Plaintiffs' allegations of the AWO partnership extend far beyond general statements and include such hallmark characteristics as the sharing of profits and losses. CC ¶973. In *Reingold*, the court discounted brochures and pamphlets purportedly linking a foreign firm to a worldwide organization because they were contradicted by contractual agreements actually before it. 599 F. Supp. at 1253-54 & n.10.

AWSC circumscribes the CC to suggest it never received profits from the AWO partnership But plaintiffs make clear that "[p]rofits were shared globally." CC ¶973(b). It also questions whether the global partnership functions as a general or limited partnership. Not only does this query attempt to insinuate issues of fact into this motion to dismiss, but it is also irrelevant to determining the AWO partners' liability for the fraudulent Enron audit reports. The actions of one partner, whether general or limited, are imputed to the others. *Engl*, 511 F. Supp. at 1154.

Nor do AWSC's other authorities support its position. In *Cromer Fin., Ltd. v. Berger*, 137 F. Supp. 2d 452, 485 & n.23 (S.D.N.Y. 2001), the plaintiffs attempted to attach liability to Ernst & Young International by piercing the corporate veil. In contrast, plaintiffs proceed with agency theories of liability *Cromer* also incorrectly concluded that a defendant must make a publicly attributable statement to be liable under §10(b) and Rule 10b-5. As the court stated in *Landry's*, and the Supreme Court just confirmed in *Zandford*, it is not necessary to make a statement for §10(b) and Rule 10b-5 liability to attach. *SEC v. Zandford*, __ U.S. __, No. 01-147, 2002 U.S. LEXIS 4023, at *12 (June 3, 2002); *Landry's*, slip op. at 9 n.12.

In *In re AM Int'l., Inc. Sec. Litig.*, 606 F. Supp. 600 (S.D.N Y. 1985), plaintiffs "sued various foreign affiliates of Price Waterhouse" who allegedly acted "as a source of information." 606 F. Supp. at 607. Here, plaintiffs allege that the AWO partners formed a network to provide worldwide services to their clients – Enron included CC ¶¶971, 973. And *Jeffries v. Deloitte Touche Tohmatsu Int'l*, 893 F. Supp. 455 (E.D. Pa. 1995), is an employment discrimination case in which the plaintiff

could not prove at the summary judgment stage of the proceedings that Deloitte Touche Tohmatsu Int'l was her actual employer. *Id.* at 456-57 [7]

2. Arthur Andersen Operated as an Agent of AWSC

Alternatively, plaintiffs' factual allegations plead a *prima facie* case that Arthur Andersen acted as the agent of AWSC in the Enron audit opinions. AWSC promoted its capacity to provide global accounting and consulting services to its clients. CC ¶¶971, 974-977. For services provided in the United States, AWSC employed Arthur Andersen as its agent. General agency law holds "principals responsible for the misstatements and omissions of their agents." *Cromer II*, 2002 U.S. Dist LEXIS 7782, at *21. The Fifth Circuit applies these general principles to violators of §10(b) and Rule 10b-5. *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1119 (5th Cir. 1980).

Cromer II is instructive on this point. There the court held that Deloitte Touche Tohmatsu, a Swiss verein, could be liable under agency principles for the securities fraud committed by its affiliate Deloitte & Touche (Bermuda). 2002 U.S. Dist. LEXIS 7782, at *2, *13, *21-*22. Deloitte Touche Tohmatsu argued – as does AWSC – that it was "actually not a single international accounting firm and that it and its member firms 'promote' the 'concept' of uniformity of service, without 'conveying that a single international accounting firm actually exists.'" *Id.* at *13. "This distinction, even if valid and effectively conveyed," wrote the court "does not exclude the creation of an agency relationship...." *Id.*

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[7] AWSC also relies on several discovery cases. These too are distinguishable. In *Goh v. Baldor Elec. Co.*, No. 3:98-MC-064-T, 1999 U.S. Dist. LEXIS 209, at *3, *7-*8 (N.D. Tex Jan 13, 1999), the court refused to compel Ernst & Young LLP to produce documents in the alleged possession of Ernst & Young Singapore and Ernst & Young Thailand because there was no evidence of common ownership and, in contrast to this case, "the evidence indicate[d] that Ernst & Young LLP, Ernst & Young Singapore, and Ernst & Young Thailand maintain separate revenues and have separate profit pools." Likewise, in *In re Citric Acid Litig.*, 191 F.3d 1090, 1106 (9th Cir. 1999), the court declined to order Coopers & Lybrand United States to produce documents possessed by Coopers & Lybrand Switzerland because it did not control its Swiss affiliate. The court noted that although the two were members of Cooper & Lybrand International, the firms, unlike here, "do not share profits or losses, nor do they have any management, authority, or control over other member firms." And *In re DeLorean Motor Co. Litig.*, No 83-CV-2137-DT, slip op. at 8 (E.D. Mich. Nov. 19, 1985), the court made a factual finding based on several affidavits that a worldwide partnership did not exist.

The *Cromer II* plaintiffs based their agency allegations on the organization of Deloitte Touche Tohmatsu's own business operations and the way it used its member firms to perform the global audit work it advertised it could do. *Id* at *14-*15. The court observed that the Deloitte Touche Tohmatsu held "itself out as a leading unified international professional services firm that delivers accounting, assurance, advisory, tax, and consulting services 'seamlessly' around the globe." *Id.* at *6. It noted that its "charter confers upon it the capacity to promulgate relevant professional standards for its member firms, and the power and authority to exercise oversight over these entities." *Id.* at *6-*7. And the court found significant that Deloitte & Touche (Bermuda) promoted itself to clients, with express approval of Deloitte Touche Tohmatsu, as a member of an international accounting firm. *Id.* at *9. These allegations, concluded the court, supported an agency relationship. Plaintiffs here make similar allegations against AWSC. CC ¶¶971, 973-977.

AWSC misreads the holding in *Cromer II* as relying on the fact that the audit report was signed "Deloitte & Touche" and allegations that Deloitte Touche Tohmatsu "stood behind" the Deloitte & Touche (Bermuda) audit. In fact, the court stated, "the plaintiffs' allegations of agency rest sufficiently on Deloitte's organization of its own business operations and the way it chose to use its member firms generally, and DTB .. specifically, to perform the audit work that Deloitte advertised that it was equipped to do around the world." *Cromer II*, 2002 U.S. Dist. LEXIS 7782, at *14. Allegations that Deloitte Touche Tohmatsu failed to disclose that only Deloitte & Touche (Bermuda), and not the global Deloitte firm, "stood behind" the audit were disallowed. *Id.* at *3.

3. AWSC Is Liable for the Securities Fraud of its Partners

AWSC also is liable for the securities fraud its partners committed as part of the Enron audits. *Suez Equity*, 250 F.3d at 101; *Cromer II*, 2002 U.S. Dist. LEXIS 7782, at *21-*22; *Engl*, 511 F. Supp. at 1154. Plaintiffs' CC pleads claims for securities fraud against AWSC partners Thomas Bauer, Joseph Berardino, Donald Dreyfus, David Duncan, James Friedlieb, Stephen Goddard, Michael Lowther, Michael C. Odom, John Stewart, and William Swanson.[8]

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[8] To prevent redundancy, plaintiffs do not detail all the allegations of securities fraud against AWSC's partners but instead incorporate by reference their oppositions to the motions to dismiss filed by Arthur Andersen and the Individual Arthur Andersen defendants.

For example, one month before Andersen certified Enron's 99 financial statements, Andersen partner Carl Bass, in a February e-mail to AWSC partner Stewart, described several Enron transactions involving an SPE – "this whole deal looks like there is no substance," which in accounting jargon means the transactions were bogus. CC ¶929 *See* Codification of Statements on Auditing Standards, AU §334.02 ("the auditor should be aware that the ***substance*** of a particular transaction could significantly differentiate from its form and that the ***financial statements should recognize the substance*** of particular transactions rather than merely their legal form."). Three days later, Bass criticized another Enron SPE in an e-mail to Stewart for having no real substance and disapproved a transaction in which Enron was set to gain from the appreciation of the capital stock it contributed to the SPE. CC ¶929. AWSC partners Bauer and Duncan were privy to these conclusions. *Id.*

Three weeks before the clean opinion Enron's 00 financial statements (issued on 2/23/01) was released, senior partners from the Andersen Chicago and Houston offices met to discuss Enron's serious accounting improprieties. CC ¶¶903, 917, 930. On 2/5/01, AWSC partners Bauer, Duncan, Goddard, Lowther, Odom, Stewart and Swanson met via teleconference to determine whether to retain Enron as a client. CC ¶930. A follow-up memo from this meeting reveals the partners identified and discussed numerous irregularities in Enron's accounting; they questioned Enron's aggressive structuring of deals as well as the propriety of the LJM transactions and the deceptive impact they had on Enron's income statement; they discussed Fastow's conflict of interest as Enron CFO and LJM fund manager; and they expressed concern over Enron's complete dependence on its current credit rating to remain solvent. *Id.* Nonetheless, they agreed to issue a clean audit opinion a few weeks later – in the face of these glaring red flags – because of Enron's potential to grow into a $100 million a year client. CC ¶¶912, 931. These allegations are more than sufficient to plead a strong inference of scienter. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 408 (5th Cir. 2001); *see Abrams v. Baker Hughes, Inc.*, No. 01-20514, 2002 U.S. App. LEXIS 9565, at *19 (5th Cir. May 21, 2002) (finding scienter where "plaintiffs .. point[] to .. particular reports or information – available to defendants before the announced financial restatements – that are contrary to the restatements"); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 362 (6th Cir. 2001) (finding that "specific

allegations that [auditor's] own internal assessments of [the company] showed [it] to have knowledge of the risk that [the company] was misleading" it may support a strong inference of scienter]); *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 293, 297 (5th Cir. 1990) (denying summary judgment where auditor admitted in work papers "'that their audit team could not accept ASK's position that the existing reserve was adequate'" but stated in public it was "'unable to determine the adequacy of the provision for uncollectible accounts'").

Plaintiffs' CC also pleads control person liability against AWSC CEO Berardino. Berardino conversed with AWSC partner David Duncan and other senior Enron engagement partners on a regular basis, keeping informed of the accounting practices at Enron – Andersen's second largest client. CC ¶93(a). He met with Enron Chief Accounting Officer Richard Causey to discuss Andersen partner Carl Bass' objections to Enron's accounting practices. *Id.* CEO Berardino and other senior partners removed Bass in accordance with Causey's demands, facilitating the continuation of the fraud. *Id.* Berardino, moreover, knew of the massive document destruction by Andersen. CC ¶966. The removal of Bass and his complicity in the document destruction illustrate the substantial control Berardino wielded over the Enron audit. *See Landry's*, slip op. at 12 n.14.

III. CONCLUSION

For the foregoing reasons, the Court should deny defendants Andersen UK and Brazil's, AWSC's, Randall and McAlindon's, and Andersen-India's Motions to Dismiss.

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Respectfully submitted,

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